In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-828

ALVIN BENTON CELCER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to show his knowing participation in a conspiracy and that the prosecutor engaged in misconduct in interrogating one of the government's witnesses.

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner and two co-defendants were found guilty under a one-count indictment charging a conspiracy to transport stolen goods valued in excess of $5,000 in interstate commerce, knowing them to have been stolen, in violation of 18 U.S.C. 371 and 2314.[1] Petitioner was sentenced to a term of thirteen months' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A) and denied rehearing (Pet. App. B).

[1]Indicted with petitioner were George Russell Slagle, Earnest English and William Ewing. Two others, Martin Vanaman and Jerry Birdwell, were named as unindicted co-conspirators. Slagle and English were convicted with petitioner, Ewing was not tried for this offense, having been incarcerated at the time of trial for a series of other thefts. Slagle's conviction was affirmed along with petitioner's (Pet. App. A), but he has not sought further review.

In early May 1971, petitioner, co-defendant Ewing and co-conspirator Vanaman went to Leisure Hours boat company to examine a Slickcraft cruiser in which petitioner was interested (Tr. 41-42). They had previously discussed stealing the boat (Tr. 43), and they agreed that petitioner's pickup truck would be used to deliver the boat to him in Salt Lake City (Tr. 44, 49). Petitioner left his pickup at Vanaman's garage (Tr. 44), where co-defendant English fitted it for pulling the boat trailer to Salt Lake City (Tr. 44-46, 185). Petitioner was to pay $4,000 for the delivery of the boat, half each to Vanaman and English (Tr. 53). English arranged with co-defendant Slagle, who had a commercial driver's license (Tr. 188), to help deliver the boat to Salt Lake City (Tr. 63, 188). Vanaman and English discussed the route to Salt Lake City and Vanaman gave English petitioner's phone number there (Tr. 64).

Several weeks later, on May 23, 1971, Vanaman, English, and Slagle went to Leisure Hours, hitched the boat (on a trailer) to petitioner's truck, and drove it away, stopping shortly after leaving to put a Texas license tag on the boat trailer (Tr. 50). English and Slagle then drove on, taking the boat to petitioner in Salt Lake City (Tr. 51).

En route they had trouble with the pickup while in Wyoming and called petitioner, who sent a truck after it (Tr. 52, 196). Petitioner came in a rented truck to see them in Wyoming, and Slagle and English hauled the boat on to Salt Lake City (Tr. 197-198), where they delivered it to the residence of petitioner's sister (Tr. 173, 199). Petitioner then took English and Slagle to the airport and they flew back to Dallas (Tr. 211).

Petitioner obtained a Utah license for the boat trailer (Tr. 108-115), and agreed to trade the boat, trailer and pickup to James R. Cullen for a B-23 bomber and parts (Tr. 123). Petitioner signed the agreement and a promissory note for $2,100 (Govt. Ex. 7) and had the boat, trailer and pickup delivered to Cullen in San Diego, California (Tr. 129-132). Petitioner presented a bill of sale to Cullen (Govt. Ex. 12) falsely stating that he had paid Michael Woodin $24,500 for the boat (Tr. 135).[2]

D. A. Cody, the owner of Leisure Hours, testified that the same boat sold by petitioner to Cullen and recovered by the FBI in San Diego, California, in May 1972 (Tr. 151-161), was found to be missing from his boat yard on May 25, 1971, along with the trailer, and that the value of the boat and trailer was $23,502.80 (Tr. 21-30).

1. In an opinion on which we rely, the court of appeals correctly found that the evidence was sufficient to establish petitioner's knowing participation in a conspiracy to steal the boat. As the court stated (Pet. App. 17-18):

> The government amply established Appellant Celcer's knowing participation in the conspiracy. Prior to the May 23, 1971, theft of the boat and trailer from Leisure Hours boat company in Addison, Texas, Celcer went with Vanaman and Ewing to see the boat. Vanaman testified that the three of them discussed stealing the boat, and that Celcer's pickup was to be used to deliver the boat to Salt Lake City, Utah. Celcer brought his pickup to Vanaman's garage; when the pickup broke down in Wyoming, Celcer provided a Ryder rent truck to carry the boat the rest of the way to Utah; he took delivery of the stolen boat and trailer from Slagle and English

[2]Petitioner testified that he had purchased the boat from co-defendant Ewing for $8,500 cash, plus a note for $8,000 payable in two years at no interest (Tr. 244, 260).

> in Salt Lake City; and he traded the boat, trailer, and pickup to one James Cullen for a B-23 bomber and parts. Celcer concedes that the evidence introduced by the government, if believed by the jury, was sufficient to establish the existence of a conspiracy. Clearly Celcer's conduct was such that the jury could have believed beyond a reasonable doubt that Celcer shared a common purpose with the other conspirators. We conclude that the government provided far more than the "slight evidence" needed to prove Celcer's knowing participation in the conspiracy. See *United States* v. *Morado*, 5 Cir. 1972, 454 F.2d 167, 175, cert. denied, 406 U.S. 917 * * *; *United States* v. *Warner*, 5 Cir. 1971, 441 F.2d 821, 830, cert. denied, 404 U.S. 829 * * *.

Petitioner's contention (Pet. 6-10) that the court of appeals' decision conflicts with the decisions of this Court in *Ingram* v. *United States*, 360 U.S. 672, 677-681, and of various courts of appeals, is based on the assertion that the record does not show that petitioner, Vanaman and Ewing "discussed stealing the boat * * *," as the court of appeals stated. However, the portion of Vanaman's testimony relied on by petitioner (Pet. 4) shows only that petitioner was not present at a discussion about stealing the boat "that day" or "[a]t that time" when they were asking the boat company about the boat's price (Tr. 76). A discussion of the theft had already occurred to which petitioner was a party (Tr. 42-43). Petitioner does not object to the charge to the jury, and in reality merely disagrees with the jury's determination that he was aware that the boat was stolen.

2. Petitioner also contends that the prosecutor's question to a witness who invoked the Fifth Amendment privilege against self-incrimination constituted misconduct. During its case-in-chief, the government called Jerry Birdwell, an unindicted co-conspirator, as a witness. Birdwell testifed that he was with petitioner and Ewing at petitioner's sister's house in Salt Lake City. Birdwell said he was inside the boat with petitioner, but, when asked whether he saw either petitioner or Ewing doing anything in the engine area, refused to answer on self-incrimination grounds (Tr. 223-224). The trial court upheld the witness's invocation of the privilege and the government did not question him further. At petitioner's request, the court instructed the jury to disregard the government's line of questioning, and none of the defendants cross-examined Birdwell (Tr. 225).

Contrary to petitioner's assertion, this single question did not deny or limit petitioner's right to cross-examine Birdwell. Although petitioner chose not to cross-examine Birdwell, he was in no way inhibited or precluded from doing so.[3] There is also no reason to believe, as petitioner

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[3]Petitioner also contends that the prosecutor improperly referred to Birdwell's assertion of his Fifth Amendment privilege during closing argument, when he stated (Tr. 306):

> Gentlemen, I think it's interesting to note how each of the attorneys has come to you and tried to tell you that don't believe Marty Vanaman. He's a convict, and he is here taking care of himself. Don't believe him.
>
> But I think you know when a man is trying to take care of himself what he does. You saw Mr. Birdwell. * * * You take the Fifth, you don't testify.

The prosecutor's brief reference, aimed at the credibility of one of his own witnesses, is not analogous to the prosecutor's comment on an accused's failure to testify on his own behalf in *Griffin* v. *California*, 380 U.S. 609, on which petitioner relies. Moreover, petitioner neither objected nor requested a corrective instruction, thereby waiving any error.

suggests, that the jury inferred petitioner's guilt from the witness's invocation of the privilege in response to this single question in a lengthy trial.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[4]Petitioner does not claim that the jury was improperly instructed concerning the impermissibility of drawing inferences from a defendant's exercise of his Fifth Amendment rights, and it cannot be presumed that the jury drew improper inferences from Birdwell's invocation of his Fifth Amendment rights.